

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF COMMERCE

In the Matter of AKM Convenience, LLC

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for a Pre-Hearing Conference before Administrative Law Judge Eric L. Lipman July 30, 2009, at the Saint Paul offices of the Office of Administrative Hearings.

Christopher M. Kaisershot, Assistant Attorney General, appeared on behalf of the Minnesota Department of Commerce (Department). There was no appearance by, or on behalf of, AKM Convenience, LLC (Respondent). Following a post-hearing submission from the Department on July 31, 2009, the hearing record closed.

STATEMENT OF THE ISSUES

1. Whether the Respondent offered gasoline for sale below cost by way of posted price or indicating meter on at least twenty-four separate occasions, in violation of Minn. Stat. § 325D.71 (2008)?

2. Whether the Respondent failed to provide complete responses to the Division's November 7, 2008 information request, the Department's December 12, 2008 information request, and the Department's January 8, 2009 Administrative Subpoena in violation of Minn. Stat. § 45.027, subds. 1(a) and 2 (2008)?

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On June 25, 2009, a Notice of and Order for Prehearing Conference in this matter was mailed to the Respondent at the following address: 523 East 11th Street, Duluth, MN 55805.¹ The Notice of and Order for Prehearing Conference indicated that a Prehearing Conference would be held in this matter on July 30, 2009.²

¹ See, Affidavit of Ann Kirlin (June 25, 2009).

² Notice and Order for Hearing, at 1.

2. The Notice and Order for Hearing in this matter includes the following statements:

Respondent's failure to appear at the prehearing conference, settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in a finding that Respondent is in default, that the Department's allegations contained in the Statement of Charges may be accepted as true, and that Respondent may be subject to discipline by the Commissioner, including revocation, suspension, censure, or the imposition of civil penalties.

....

Under Minn. Stat. § 45.027, subd. 6 (2008), Respondent may be subject to a civil penalty not to exceed \$10,000 per violation upon a final determination that Respondent violated any law, rule or order related to the duties entrusted to the Commissioner.³

3. No one appeared at the July 30, 2009 conference on behalf of AKM Convenience, LLC. No prehearing request was made for a continuance, nor was any communication received by the undersigned from AKM Convenience, LLC.

4. The Statement of Charges alleges that:

- (a) Minnesota law prohibits any retailer from offering gasoline for sale below cost by way of posted price or indicating meter. See Minn. Stat. § 325D.71 (2008).
- (b) Minnesota law defines "cost" as "the average terminal price on the day, at the terminal from which the most recent supply of gasoline delivered to the retail location was acquired, plus all applicable state and federal excise taxes and fees, plus the lesser of six percent or eight cents." Minn. Stat. § 325D.01, subd. 5(3) (2008).
- (c) Minnesota law defines "average terminal price" as the "arithmetic mean of all prices for an individual grade of gasoline at a terminal as published by a nationally recognized petroleum price reporting service." Minn. Stat. § 325D.01, subd. 12 (2008).
- (d) Respondent owns and operates a retail gasoline station in Roseville, Minnesota.
- (e) On information and belief, Respondent offered gasoline for sale below cost by way of posted price or indicating meter on at least

³ Notice and Order for Hearing, at 4, ¶ 1 and 6, ¶ 10.

twenty four occasions: August 17, 19-21, and 30-31, September 1, and 3-4, October 29 and 30, November 1-2, 6-11, and 13-17, 2008.

- (f) Respondent's misconduct lessened, injured, destroyed, or prevented competition.
- (g) The Department's Weights and Measures Division ("Division") sent Respondent a warning letter on September 24, 2008. After Respondent continued to offer gasoline for sale below cost, the Division sent Respondent an information request on November 7, 2008, as well as a notice of continuing violation on November 12, 2008.
- (h) On November 18, 2008, Respondent refused to produce the requested documentation to the Division and, instead, vaguely suggested that other retailers sold gasoline at the same or lower prices offered by Respondent.
- (i) On December 12, 2008, the Department sent Respondent a follow-up information request that required a response by December 31, 2008.
- (j) On December 24, 2008, the Department received a letter from Respondent that did not include the requested information. Respondent offered, in part, the following explanation for offering gasoline for sale at an illegal price:

I did not keep records to demonstrate what I sold regular unleaded gasoline for, but I do know that I instructed AKM Convenience to move its regular gasoline prices two and three times a day based on our competitors['] pricing daily during the period in question

If you want me to confess that AKM sold its gas below legal limit, then this is a confession that AKM sold gas based on competitor pricing without regard to legal limit.

- (k) On January 8, 2009, the Department served Respondent with an Administrative Subpoena that required Respondent to produce specific records to the Department for the period between August 17, 2008, and December 31, 2008.
- (l) By letter dated January 11, 2009, Respondent refused to produce any documents to the Department in response to its Administrative Subpoena.

5. The allegations contained in the Statement of Charges are deemed proven and are incorporated into these Findings by reference.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 45.027 and 325D.71.

2. Respondent received notice of the charges against him and of the time and place of the evidentiary hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. Respondent is in default as a result of his failure, without the Administrative Law Judge's prior consent, to appear at the scheduled Pre-Hearing Conference.

4. Pursuant to Minn. R. 1400.6000, a contested case may be decided adversely to a party who defaults. Upon default, the allegations and claims set forth in the Statement of Charges may be taken as true or deemed proved without further evidence.

5. Based upon the facts set forth in the statement of charges, Respondent violated Minn. Stat. § 325D.71 (2008) by offering gasoline for sale below cost by way of posted price or indicating meter on at least twenty-four separate occasions.

6. Based upon the facts set forth in the statement of charges, Respondent violated Minn. Stat. § 45.027, subds. 1(a) and 2 (2008) by failing to provide complete responses to the Division's November 7, 2008 information request, the Department's December 12, 2008 information request, and the Department's January 8, 2009 Administrative Subpoena.

7. Minn. Stat. §§ 45.027 and 325D.71 empowers the Commissioner to take disciplinary action against the Respondent, for its violations of agency orders, state statute and state rules.

8. The imposition of a disciplinary action against Respondent is in the public interest.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that an administrative sanction be applied against AKM Convenience, LLC.

Dated: August 31, 2009

/s/ Eric L. Lipman

ERIC L. LIPMAN

Administrative Law Judge

Reported: Digital Recording
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Glenn Wilson, Commissioner, Department of Commerce, 85 Seventh Place East, Suite 500, St. Paul, MN 55101 to learn about the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.